

D.T.E. 99-105-A

Investigation by the Department of Telecommunications and Energy, on its own motion, as to the propriety of the Local Service Provider Freeze terms and conditions set forth in the following tariff: M.D.T.E. No. 10, Part A, Section 5, Original of Page 1.1, filed with the Department on November 1, 1999 by New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts

ORDER ON MOTION BY AT&T COMMUNICATIONS OF NEW ENGLAND, INC.
FOR RECONSIDERATION AND MOTION FOR EXTENSION OF
JUDICIAL APPEAL PERIOD

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I. INTRODUCTION

On May 31, 2000, the Department of Telecommunications and Energy ("Department") issued an Order, D.T.E. 99-105, conditionally granting New England Telephone and Telegraph Co. d/b/a Bell Atlantic-Massachusetts' ("Bell Atlantic" or "BA-MA") proposed tariff introducing its Local Service Provider Freeze ("LSPF") offering.⁽¹⁾ In the May 31, 2000 Order ("Order"), the Department determined that Bell Atlantic may offer LSPF to their residential and business customers only with certain enumerated safeguards in place and ordered Bell Atlantic to file a revised tariff within thirty days of the Order. D.T.E. 99-105,

at 12, 30. In the Order, the Department prohibited Bell Atlantic from actively marketing LSPF, and restricted Bell Atlantic from discussing LSPF with customers, and from offering to place LSPF on a customer's account, unless either local slamming has occurred in a customer's account or the customer initiates a slamming inquiry directly. Id. at 22-23. The Department also required Bell Atlantic to allow their customers the option of LSPF removal through a secure website. Id. at 28. In addition, the Department required Bell Atlantic to inform all Massachusetts local service providers of the availability of LSPF removal through the website and how to link to it. Id. The Department further required Bell Atlantic to notify all Massachusetts local service providers how LSPF information is indicated in customer service records accessible to competing companies in a pre-order environment. Id. at 32. The Department rejected intervenors' recommendations for a third-party to administer Bell Atlantic's proposed LSPF, finding there was insufficient evidence in the record regarding how such a system of administration would work or be funded for the Department to require the creation of a third-party administrator ("TPA") as a condition for the allowance of LSPF. D.T.E. 99-105, at 17-18. The Department also noted that even if the record were more developed regarding a TPA, the Department was not convinced that a TPA was necessary or appropriate. Id. at 17. The Department further noted that the Federal Communications Commission ("FCC") recently rejected the creation of a national TPA to administer the FCC's slamming liability rules. Id. (citing Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act of 1996, Policies and Rules

Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, First Order on Reconsideration, FCC 00-135, at ¶¶ 22-28 (rel. May 3, 2000)).

On June 13, 2000, AT&T Communications of New England, Inc. ("AT&T"), filed with the Department a Motion for Extension of Judicial Appeal Period ("Motion to Extend"), in which AT&T informed the Department of AT&T's intent to file a motion for reconsideration of the Department's Order D.T.E. 99-105 (Motion to Extend at 1). In the Motion to Extend, AT&T requested an extension of the judicial appeal period until twenty days following such time as the Department rules on the motion for reconsideration (*id.*). No party filed a response to AT&T's Motion to Extend. On June 20, 2000, AT&T filed with the Department a Motion for Reconsideration of the May 31, 2000 Order in D.T.E. 99-105 ("Motion to Reconsider"). A Hearing Officer Memorandum, dated June 26, 2000, gave the parties until June 30, 2000 to file comments on AT&T's Motion to Reconsider. On June 30, 2000, Bell Atlantic and the Massachusetts Attorney General ("Attorney General" or "AG") filed comments in opposition to AT&T's Motion to Reconsider. Also on June 30, 2000, WorldCom, Inc. ("WorldCom") filed comments in support of AT&T's Motion to Reconsider.

II. MOTION FOR RECONSIDERATION

A. Standard of Review

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Essex County Gas Company, D.P.U. 87-59-A at 2 (1988); Western Massachusetts Electric Company, D.P.U. 85-270C at 12-13 (1987); Hutchinson Water Company, D.P.U. 85-194-B at 1 (1986).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Western Massachusetts Electric Company, D.P.U. 84-25-A at 6-7 (1984); Boston Edison Company, D.P.U. 1720-B at 12 (1984); Hingham Water Company, D.P.U. 1590-A at 5-6 (1984); Boston Edison Company, D.P.U. 1350-A at 4 (1983); Trailways of New England, Inc., D.P.U. 20017, at 2 (1979); Cape Cod Gas Company, D.P.U. 19665-A at 3 (1979).⁽²⁾ Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue

was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1985).

B. Positions of the Parties

In its Motion to Reconsider, AT&T states that previously unknown facts have come to light after the Department issued D.T.E. 99-105 that have a significant impact on the Department's decision (Motion to Reconsider at 1). AT&T argues that the New England Conference of Public Utility Commissioners, Inc. ("NECPUC") is holding a Consumer Affairs Workshop on Unauthorized Charges Resulting from Carrier Changes on July 14, 2000 in Boston, Massachusetts, and the scheduling of this workshop evidences a concern on the part of New England consumer affairs officials that the current carrier change process is already too complex to be easily understood and navigated by consumers (Motion to Reconsider at 1, 6). AT&T argues that the addition of a Bell Atlantic administered local freeze option to the local carrier change process would make local carrier changes even more time-consuming and frustrating for consumers (id. at 5). AT&T further argues that the information derived from the NECPUC workshop will provide the Department with a basis for creating a TPA to resolve globally the issues surrounding preferred carrier changes, including issues related to both billing and freezes (id. at 2). In its Motion to Reconsider, AT&T further requests that the Department:

(i) establish a joint Department-Industry commission to investigate the process by which a TPA could administer all preferred carrier changes on a state-wide basis;

(ii) revise its May 31, 2000 Order to reflect the same; and

(iii) delay implementation of LSPF until the Department mandates the creation of a TPA or until NECPUC recommends how to resolve the issues raised at its July 14, 2000 workshop.

(Id. at 6-7).

In its Comments supporting AT&T's Motion to Reconsider, WorldCom states that the upcoming NECPUC workshop was prompted by "the complexity of the carrier change process," a concern shared by WorldCom (WorldCom Comments at 1). WorldCom further states that the relief requested by AT&T is appropriate given the Department's goal of protecting consumers from unauthorized switching of service providers and because AT&T's requested relief will avoid the anticompetitive nature of a Bell Atlantic administered LSPF (id. at 1-2).

In its opposition to AT&T's Motion to Reconsider, Bell Atlantic states that AT&T's Motion to Reconsider does not meet the Department's standard of review for reconsideration and should be denied (BA-MA Comments at 2-3). Bell Atlantic argues that the mere fact that NECPUC has scheduled a workshop to discuss carrier billing is not an "extraordinary circumstance" that would have a "significant impact" on the

Department's decision (id. at 3). Bell Atlantic further argues that the relief requested by AT&T (i.e., the establishment of a TPA to manage the entire preferred carrier change process, of which LSPF is only a part) is beyond the scope of the LSPF proceeding and inappropriate within the context of reconsideration (id.).

In his opposition to AT&T's Motion to Reconsider, the Attorney General states that the new evidence on which AT&T bases its Motion to Reconsider is nothing more than AT&T's expectations regarding the content of discussions during the upcoming NECPUC workshop, to be held thirteen weeks after the close of evidentiary hearings (AG Comments at 1). The Attorney General argues that the fact that some persons may make statements at the workshop that are inconsistent with the findings made by the Department in D.T.E. 99-105 does not satisfy the standard of extraordinary circumstances that dictate the Department take a fresh look at the record for the purpose of substantively modifying its decision (id. at 1-2).

C. Analysis and Findings

AT&T does not claim that the Department's treatment of Bell Atlantic's proposed LSPF tariff was the result of mistake or inadvertence. Rather, AT&T's request for reconsideration claims that new evidence has come to light since the Department's Order in D.T.E. 99-105 that has a significant impact on the Department's decision. However, an examination of the "new evidence" presented by AT&T makes clear that this evidence does not meet the Department's threshold requirement for reconsideration, and therefore, AT&T's Motion to Reconsider must be denied.

AT&T suggests that the very fact that NECPUC has chosen to schedule an industry workshop on unauthorized charges resulting from carrier changes indicates that the preferred carrier change process has become a significant regional concern. The Department does not dispute the suggestion that a streamlined preferred carrier change process is a significant concern in a competitive environment. The parties and the Department spent considerable time in the instant proceeding discussing the local carrier change process and how the presence of a local freeze on a customer's account would impact that process. The fact that other state commissions share the Department's concern about the carrier change process would not be surprising. However, even if the Department were to accept AT&T's assertion that the NECPUC workshop is resultant from corresponding regional concern, this "new evidence" of regional concern would not have a significant impact on the Department's decision to allow LSPF in Massachusetts with the safeguards in place mandated by its Order.

Further, the Department is not convinced, from reviewing the NECPUC workshop brochure and invitation attached to AT&T's Motion to Reconsider, that the workshop is sufficiently related to the issues decided by the Department in D.T.E. 99-105. See Motion to Reconsider, Exhibit A. It is not clear from the materials provided by AT&T that LSPF,

TPAs, or issues relating to the provision of local service would be discussed at the workshop to any degree that would provide a basis for Department reconsideration of its Order. According to the materials provided by AT&T, the workshop is primarily designed to discuss billing issues relating to long distance carrier changes. In addition, the NECPUC materials provided by AT&T indicate "[i]t is our hope that the group can develop solutions that will make formal commission action in this area unnecessary" (Motion to Reconsider, Exhibit A

at 2), a goal antithetical to the relief sought by AT&T.

Lastly, AT&T's Motion to Reconsider requests relief that is outside the scope of the Department's LSPF proceeding. The Department's investigation in D.T.E. 99-105 focused on Bell Atlantic's proposed freeze option for local service; other Department proceedings have considered the provision of other service freeze options.⁽³⁾ AT&T's recommendation for the Department to create a TPA to manage all service carrier changes to resolve global billing and freeze issues for local, intra-LATA toll and inter-LATA carriers is beyond the scope of the instant proceeding.

In conclusion, the Department finds that the NECPUC workshop provides an inadequate basis for a motion for reconsideration and therefore denies AT&T's Motion to Reconsider.

III. MOTION FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

A. Standard of Review

G.L. c. 25, § 5, provides in pertinent part, that an appeal of a Department final order must be filed with the Department no later than twenty days after service of the order "or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said . . . decision or ruling."⁽⁴⁾ See also 220 C.M.R. § 1.11(11).

The twenty day appeal deadline indicates a clear intention on the part of the Legislature and the Department to ensure that the decision of an aggrieved party to appeal a final order of the Department must be made expeditiously. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Ruth C. Nunnally d/b/a L&R Enterprises, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extensions of the appeal period shall be granted upon showing of good cause. 220 C.M.R. § 1.11(11). In regards to determining what constitutes good cause, the Department has stated:

Good cause is a relative term and it depends on the circumstances of an individual case. Good cause is determined in the context of an underlying statutory or regulatory requirement and is based on a balancing of the public interest, the interest of the party seeking an exception, and the interests of any other affected party.

Boston Edison Company, D.P.U. 90-355-A at 4 (1992).

Frequently, the Department must consider a request to extend the appeal period filed jointly with a motion for reconsideration. We announced our good cause standard in that context in Fall River Gas Company, D.P.U. 89-199-A (1989) ("Fall River Gas"), where we held that the contemporaneous filing by the Attorney General of a motion for reconsideration of a Department order was not sufficient to constitute good cause for purposes of tolling the time period for filing an appeal, "notwithstanding the common practice of the Department to grant such motions when accompanied by a motion to reconsider a rate case [o]rder." Fall River Gas at 7.

B. Analysis and Findings

In AT&T's Motion to Extend, AT&T requested that the Department extend the deadline for filing a judicial appeal until twenty days following the Department's ruling on AT&T's Motion to Reconsider (Motion to Extend at 1). However, AT&T provided no showing of good cause indicating why the Department should grant AT&T's Motion to Extend other than the fact that AT&T intended to file a motion for reconsideration within the twenty day period prescribed by 220 CMR § 1.11(11). This situation is analogous to Fall River Gas, in which the Department held that "the mere filing of a motion for reconsideration is insufficient to toll the time period for filing an appeal." Fall River Gas at 7. The Department notes that AT&T's Motion to Extend was filed with the Department on June 13, 2000, seven days before the twenty-day deadline for filing appeals (June 20, 2000). The filing of the Motion to Extend operated to toll the appeal period until the Department rules on the motion. See Ruth C. Nunnally d/b/a/ L&R Enterprises, D.P.U. 92-34-A at 6 n.6 (1993). Therefore, even if the Department were to deny AT&T's Motion to Extend, AT&T would still have seven days to file its petition for appeal of the Department's Order in D.T.E. 99-105.

Taking into account the Department's requirement of a showing of good cause for an extension of the judicial appeal period; the Department's holding in Fall River Gas that

filing a motion for reconsideration does not in itself constitute good cause for an extension; AT&T's failure to provide any other reason for its request for extension other than its pending motion for reconsideration; as well as the seven days remaining in which AT&T may yet file its petition for appeal, the Department denies AT&T's request to extend the judicial appeal period.

IV. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motion of AT&T for reconsideration filed with the Department on June 20, 2000, pertaining to the Department's Order dated May 31, 2000, be and is hereby DENIED; and it is

FURTHER ORDERED: That the motion of AT&T for extension of the judicial appeal period filed with the Department on June 13, 2000, be and is hereby DENIED.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Bell Atlantic proposed to offer LSPF as a means of protection from unauthorized changes to its customers' local service. If a customer chooses to have LSPF, the presence of a freeze on the customer's local account will prevent a change in the customer's provider of local service until the customer removes the freeze.
2. The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. See generally, Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987).
3. See IntraLATA Presubscription, D.P.U. 96-106 (1997) (holding that Bell Atlantic's proposed intraLATA toll preferred carrier freeze was reasonable); Tel-Save, Inc., D.T.E. 98-59 (1999) (holding that use of a secure website for preferred carrier freeze removal was reasonable).
4. G.L. c. 25, § 5 states that ". . . service shall be presumed to have occurred in the normal course of delivery of [the] mail."